No. 85-821

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF FLORIDA, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly dismissed petitioners' suit challenging the Secretary of the Interior's action in taking a parcel of land in trust for the Seminole Tribe pursuant to 25 U.S.C. 465.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-55a) is reported at 768 F.2d 1248. The order of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1985, and the petition for a writ of certiorari was filed on November 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioner City of Tampa unearthed an Indian burial site in the course of a construction project. In order to enable the project to go forward, the City entered into an agreement with respondent Seminole Tribe of Florida, under which the numerous Indian artifacts and skeletal

remains were to be transferred to the Tribe. The Tribe in turn was to acquire a site in Hillsborough County, Florida, on which to construct a museum for display of the artifacts and to inter the remains. The Tribe bought an 8.5-acre parcel of land for these purposes, and it thereafter petitioned the Secretary of the Interior to acquire title to the land in trust pursuant to Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465. Pet. App. 15a-16a.

Under 25 U.S.C. 465 the Secretary is authorized, "in his discretion," to acquire land "for the purpose of providing land for Indians," with the title to be taken in the name of the United States in trust for the tribe or individual Indians concerned. In governing regulations, now codified at 25 C.F.R. 151.10, the Secretary has identified certain factors to be considered in determining whether to take land in trust.[1] However, the Secretary has retained the authority to

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[1] 25 C.F.R. 151.10 provides:

§ 151.10 Factors to be considered in evaluating requests.

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

waive those provisions "in all cases where permitted by law and the Secretary finds that such waiver * * * is in the best interest of the Indians." 25 C.F.R. 1.2.

On January 16, 1981, the Secretary accepted the Seminole Tribe's 8.5-acre parcel in trust under 25 U.S.C. 465 (Pet. App. 21c-25c). In so doing, he exercised the power reserved under 25 C.F.R. 1.2 to waive the provisions of the trust acquisition regulations (Pet. App. 18c-21c), concluding that the waiver "would be in the best interest of the Indians" (Pet. App. 18c). The Secretary explained that the particular property presented an "unusual" situation, "because of the unique cultural significance of its intended use" (*id.* at 19c). In the Secretary's view, it was appropriate to consider—in addition to the factors normally taken into account in acquiring land in trust—the policy of the Indian Religious Freedom Act of 1978, 42 U.S.C. 1996, to protect and preserve the Indians' use and possession of sacred objects.[2]

Shortly after the United States accepted the property in trust, the Tribe prepared an interment site for the Seminole remains, erected a cultural museum, and developed a center for exhibiting Indian art and craftwork. In addition, the Tribe began operation of a "Smoke Shop," at which cigarettes were sold, tax free, to the general public. Pet. App. 18a.

(g) If the land to be acquired is in fee status whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

[2]42 U.S.C. 1996 provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

2. Petitioners (the State of Florida, its Departments of Business Regulation and Revenue, and the City of Tampa) then brought this suit in the United States District Court for the Middle District of Florida to challenge the United States' acquisition of the property in trust for the Tribe. Petitioners sought: (i) a declaratory judgment that the acquisition was void because the Secretary did not adhere to the standards in the governing regulations (now 25 C.F.R. 151.10) for acquiring property in trust for Indians, and (ii) an injunction prohibiting the United States from treating the property as being held in trust for the Seminole Indians (Pet. App. 16c). The Tribe was granted leave to intervene (*id.* at 18a-19a). Thereafter, in a brief order, the district court granted the motion of the Secretary and the Tribe to dismiss the complaint (Pet. App. 1a-2a). It held that petitioners lacked standing to bring the suit and that the court lacked jurisdiction because the United States had not waived its sovereign immunity with respect to the subject matter of the suit.[3]

3. The court of appeals affirmed on the ground that the suit is barred by the sovereign immunity of the United States (Pet. App. 5a-55a).[4] The court first determined that the United States is the real party in interest in this case, even though petitioners named the Secretary of the Interior as the defendant, because petitioners seek "to divest the United States of its title to the land" and because, "[c]learly,

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[3]Petitioners had moved to amend their complaint to allege that the Tribe was conducting bingo games on the property, that the Tribe was not collecting the state sales tax on taxable transactions occurring on the land, and that the property was listed on the Hillsborough County tax rolls as being tax-exempt. However, the district court granted the motion to dismiss without ruling on the motion to amend the complaint. Pet. App. 19a.

[4]The court of appeals therefore did not reach the question of petitioners' standing to bring this suit. Pet. App. 54a.

this relief would operate against the sovereign" (*id.* at 23a).[5] The court rejected petitioners' contention that this case could proceed as an "officer's suit," under *United States* v. *Lee*, 106 U.S. 196 (1882), to challenge the authority of the Secretary of the Interior to take the land in trust (Pet. App. 23a-31a). The court observed that petitioners did not suggest that the Secretary was without statutory authority to accept the land in trust, since 25 U.S.C. 465 expressly authorized him to do so. It further observed that petitioners challenged neither the constitutionality of the Secretary's actions nor the constitutionality of the statute under which he acted (*id.* at 26a-29a). Thus, petitioners' "only complaint" was that "the Secretary abused his discretion by waiving consideration of the factors delineated in the [trust acquisition] regulations" (*id.* at 27a). However, the court understood those regulations merely to identify factors to be considered by the Secretary in the exercise of his discretion, not to constrain the Secretary's authority under 25 U.S.C. 465 to acquire land in trust. For this reason, the court concluded that petitioners "have failed to demonstrate that the Secretary exceeded his authority," and it accordingly held that this suit could not proceed as an officer's suit (Pet. App. 30a).

Having concluded that the suit must be regarded as one against the United States, the court of appeals rejected petitioners' contention that the United States had waived its

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[5]The court of appeals observed that petitioners initially acquiesced in the Secretary's decision to take the land in trust, and protested only after the Tribe began to sell cigarettes and operate bingo games on the land. For this reason, the court explained, the gravamen of petitioners' complaint concerns the Tribe's conduct, not the decision of the United States to hold the land in trust. But the court noted that if the United States were to be divested of its title to the land, the State presumably could take steps to end the conduct to which it objects. Pet. App. 22a-23a.

immunity to suit (Pet. App. 32a-54a). The court of appeals recognized that under the Administrative Procedure Act (APA), 5 U.S.C. 702, Congress has waived the immunity of the United States in a suit against an officer of the United States for non-monetary relief. But the court relied on the final sentence of 5 U.S.C. 702, which provides that that section is not to be read as "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The court found such a prohibition in the Quiet Title Act (QTA), 28 U.S.C. 2409a.

The QTA grants consent to bring an action against the United States to adjudicate disputed title to property in which the United States claims an interest, but expressly does not apply to "trust or restricted Indian lands" (28 U.S.C. 2409a(a)). The court of appeals reasoned that, under this Court's decision in *Block* v. *North Dakota,* 461 U.S. 273, 280-286 & n.22 (1983), the QTA is the exclusive means by which a person may challenge the United States' title to land and that such a suit therefore may not be brought against a federal officer under the APA, 5 U.S.C. 702, for that purpose. The court of appeals recognized that petitioners do not assert an adverse interest in the 8.5-acre parcel or seek to have title to that parcel quieted in themselves. But, in the court's view, the statutory prohibition against suits to quiet title to Indian trust lands reflects a congressional determination to prevent third parties from interfering with the trust relationship between the Indians and the United States—a policy that applies equally in this case because petitioners seek to divest the United States, as trustee, of its title to the land. Pet. App. 33a-41a.

The court of appeals believed that its conclusion that Congress did not intend to countenance interference by third parties with the United States' trust relationship with the Indians was bolstered by the fact that agency action is

unreviewable in any event under the APA if it "is committed to agency discretion by law." In finding this exception to be applicable here, the court reasoned that the relevant statute, 25 U.S.C. 465, expressly authorizes the Secretary, "in his discretion," to acquire land in trust for Indians and imposes no standards for the exercise of that discretion (except to bar the acquisition of land outside the boundaries of the Navajo Reservation). The court also found it significant that the Secretary's decision whether to acquire land in trust "would involve a myriad of factors, including internal management constraints relating to budget limits, the particular needs of the numerous individual Indians and Indian tribes, the proposed use of the land, and government resources for overseeing the land" (Pet. App. 49a). Against this background, the court concluded that "the Secretary [must] have broad discretion when reviewing an application for land acquisition" (*ibid.*). The court rejected petitioners' contention that the factors listed in 25 C.F.R. 151.10 furnish sufficient "law" to be applied by a court in reviewing a decision by the Secretary to take particular land in trust. In the court's view, the regulations merely guide the exercise of the Secretary's discretion, because they do not purport to state how the agency should balance the various factors (Pet. App. 51a-54a).

ARGUMENT

The court of appeals correctly concluded that the Secretary's decision to accept the 8.5-acre parcel of land in trust for the Seminole Tribe is not subject to judicial review. Its holding does not conflict with any decision of this Court or of another court of appeals, and review therefore is not warranted.

1. The court of appeals was clearly correct in concluding that because petitioners seek "an order divesting the United States of its title to land held for the benefit of an Indian

tribe" (Pet. App. 38a), the relief "would operate against the sovereign" (*id.* at 23a). See *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687-688 (1949). Congress has not waived the sovereign immunity of the United States to such a suit.

The Quiet Title Act provides that the United States may be named as a party defendant in a "civil action * * * to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). However, the QTA expressly does not apply to "trust or restricted Indian lands" (*ibid.*). In *Block* v. *North Dakota*, the Court held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286. The Court accordingly rejected the contention that a party could contest the United States' title to real property simply by bringing an action against the responsible federal officer, either under the APA or pursuant to other authority. See 461 U.S. at 280-286 & n.22.[6] Otherwise, the Court reasoned, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted." *Id.* at 284-285.

In particular, the Court observed in *Block* v. *North Dakota* that if it "were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the

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[6]With respect to the APA, the Court observed in *Block* v. *North Dakota* that the last sentence of 5 U.S.C. 702 states that it confers no authority to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Court concluded that the QTA is an "other statute" within the meaning of this sentence, because the QTA "forbids the relief" sought if the conditions it imposes on Congress's consent to suit are not satisfied. See 461 U.S. at 286 n.22.

Indian lands exception to the QTA would be rendered nugatory." 461 U.S. at 285. Yet that is preceisely what petitioners have attempted to do here. In this suit against the Secretary of the Interior, petitioners challenge the United States' title to the 8.5-acre parcel, contending that the Secretary's acceptance of title on behalf of the United States, in trust for the Seminole Tribe, was "void" (Pet. 25; Pet. App. 16c). They thereby attempt to render nugatory the express exception in the QTA for Indian trust lands.

To be sure, the petitioners in this case are not adverse claimants, in the sense that they do not actually seek to quiet title to the land in themselves. But as the court of appeals observed (Pet. App. 38a-41a):

> Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be lesser than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.

This suit therefore is barred by the exception to the QTA for Indian trust lands.[7]

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[7]Petitioners' reliance (Pet. 26-29) on *United States* v. *Lee, supra; Larson* v. *Domestic & Foreign Corp*, 337 U.S. 682 (1949); and *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), is misplaced. As this Court concluded in *Block* v. *North Dakota* with respect to these very cases, any means the officer's suit might once have afforded for adjudicating the United States' title to property has been superseded by the QTA. See 461 U.S. 281-282. Petitioners' reliance (Pet. 22-26) on *Land* v. *Dollar*, 330 U.S. 731 (1947), is misplaced for the same reason. That case did not involve a situation in which Congress intended a form of action other than an officer's suit to be the exclusive means for the adjudication of the particular issue.

Finally, *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982), upon which petitioners also rely (Pet. 29-31), lends no support to their position. There the plurality opinion concluded that, under the rationale of *Larson*, the suit against the state officers for possession of the property in question was not barred by the Eleventh

2. Quite aside from the independent bar to suit that derives from the QTA, petitioners have no right of action under the APA itself in this case. The APA does not provide a cause of action for judicial review where the "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The court of appeals correctly held that the Secretary's decision to accept the land in trust for the benefit of the Seminole Tribe was committed to the Secretary's discretion under this provision and therefore is not subject to judicial review. Under 25 U.S.C. 465, "[t]he Secretary * * * is authorized, *in his discretion,* to acquire" land in trust (emphasis added), and the statute does not identify the circumstances in which such an acquisition is appropriate. Compare *Heckler* v. *Chaney,* No. 83-1878 (Mar. 20, 1985), slip op. 13. Moreover, the nature of the decision the Secretary must make reinforces the conclusion that it is one committed to his discretion. As the court of appeals explained (Pet. App. 48a-49a), whether to acquire a parcel in trust requires a consideration of a number of factors, including budget and program limitations, the needs of the Indians concerned, and the impact on the local community. Thus, 25 U.S.C. 465 is " 'drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971). See also *Heckler* v. *Chaney,* slip op. 8-9; *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 317-319 (1958).

Amendment, because it was essentially undisputed that the state officers were acting beyond the scope of their authority by withholding possession of the artifacts from the private plaintiff. 458 U.S. at 692-697. But the plurality opinion expressly did not address the application of sovereign immunity principles in a case involving the government's *ownership* of the property in question—the issue involved in this case. *Id.* at 697, 699. In addition, *Treasure Salvors,* like the decisions discussed in the first paragraph of this footnote, did not involve a situation in which Congress had designated another form of action as the exclusive means of adjudicating the disputed question.

Petitioners in fact concede that 25 U.S.C. 465, when read in conjunction with 5 U.S.C. 701(a)(2), "would appear to prohibit judicial review." See Pet. 33. But petitioners argue (Pet. 31-41) that the Secretary has circumscribed his discretion under the statute by adopting the trust acquisition regulations, which identify a number of factors the Secretary will consider when deciding whether to take land in trust, and that a court may review the Secretary's action to determine whether it complies with these regulations. There are several flaws in this argument.

First, as the court of appeals pointed out, the factors listed in the regulations are intended merely to guide the Secretary in the exercise of his discretion. The regulations do not purport to identify the weight to be given each of the various factors or direct how they should be weighed against one another; nor do they circumscribe the Secretary's authority to acquire land in certain areas or limit the size of the tracts that may be acquired. For these reasons, "[t]he factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case" (Pet. App. 52a).

Second, even assuming that the trust acquisition regulations establish binding legal standards where they apply, petitioners' objection in this case nevertheless must fail because the Secretary exercised his reserved authority to waive the application of the regulations if he finds that it is "in the best interest of the Indians" to do so. 25 C.F.R. 1.2. The Secretary made such a finding here. See Pet. App. 18c. A court has no judicially manageable standards for reviewing such a finding by the Secretary. In fact, petitioners do not appear to contend in this case that the acquisition was *not* in the best interest of the Indians; and it cannot be presumed in any event that either Congress or the Secretary would have intended for that question to be litigated in a suit brought by a third party, since it is the Secretary who is

charged by law with implementing the responsibilities of the United States in its capacity as trustee for the Indians. Accordingly, the decision whether to waive the provisions of the trust acquisition regulations in a particular case plainly is one committed to the Secretary's discretion within the meaning of 5 U.S.C. 701(a)(2). It therefore is not subject to judicial review under the APA.[8] This narrow question of reviewability under the particular regulations at issue in this case does not warrant review by this Court.

3. For the foregoing reasons, the Secretary's decision to acquire the 8.5-acre parcel in trust for the Seminole Tribe is not subject to judicial review. To the extent that petitioners are concerned not about the acquisition of the property for purposes of preserving and displaying the artifacts, but rather about the untaxed sale of cigarettes on the tract,

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[8]Petitioners rely (Pet. 34) on language in 25 C.F.R. 1.2 that provides for the Secretary to waive the provisions of applicable regulations "where permitted by law." Petitioners point out that in deciding to grant such a waiver in this case, the Secretary cited 42 U.S.C. 1996, the Indian Religious Freedom Act, which provides that it shall be the policy of the United States, inter alia, to protect and preserve the right of Indians in the "use and possession of sacred objects." See Pet. App. 20c. In petitioners' view, 42 U.S.C. 1996 did not furnish a basis for the waiver in this case because that statute does not affirmatively authorize such a waiver. See Pet. 34. This argument is frivolous.

Petitioners essentially concede (Pet. 33) that, in the absence of the regulations, the Secretary would have had unreviewable discretion to acquire the land in trust. Accordingly, a decision by the Secretary to exercise his retained authority to waive the regulations, and thereby to commit the matter entirely to the discretion of the Secretary under the statute itself, is "permitted by law" (*i.e.*, is "permitted" by 25 U.S.C. 465) within the meaning of 25 C.F.R. 1.2. In any event, the congressional policy in 42 U.S.C. 1996 provides an independent basis for such a waiver in this case. It is irrelevant that, as petitioners point out (Pet. 34), 42 U.S.C. 1996 does not expressly refer to such a waiver. Surely the overriding *statutory* policy to preserve Indian religious freedom permits a waiver of *administrative* regulations that otherwise might frustrate that policy.

this is not the appropriate case in which to address petitioners' concerns. The extent to which state law may be applied on land held in trust for an Indian tribe requires an ad hoc balancing of the relevant federal, state and tribal interests at stake. See, *e.g., Ramah Navajo School Board* v. *Bureau of Revenue,* 458 U.S. 832, 837, 845-846 (1982). The application of particular state laws to conduct on the tract therefore must be resolved on a case-by-case basis when and if the State or its political subdivisions seek to apply a particular law in a manner that affects federal or tribal interests. We also note that, even on an Indian reservation, federal law imposes no absolute barrier to the imposition of state cigarette and other taxes on sales made by Indians to non-Indians. See *Washington* v. *Confederated Tribes,* 447 U.S. 134, 151, 155-157, 161 (1980); *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 482-483 (1976); *Seminole Tribe* v. *Butterworth,* 658 F.2d 310, 317 n.9 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982). Thus, the mere fact that the 8.5 acres have been taken in trust by the United States does not necessarily oust the application of state revenue laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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